

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA, et al.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-CV-00329-TCK-SAJ</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S RESPONSE TO  
PETERSON FARMS, INC.'S MOTION TO STRIKE**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), by and through counsel, and responds to the "Motion to Strike" [Dkt. # 962] of Peterson Farms, Inc. ("Peterson") as follows:

1. Peterson's motion to strike is an ancillary move to the dispute between Cobb-Vantress, Inc. ("Cobb-Vantress") and the State regarding the State's assertion of work product protection for its trial preparation materials. The Court is well informed about that dispute, both from the extensive briefing and from the oral argument conducted on August 10, 2006. Peterson now moves to strike the portion of the "State's Response to the Supplemental Brief in Support of Defendant Cobb-Vantress, Inc.'s First Motion to Compel" [Dkt. # 960] (hereafter "State's Response") that correctly pointed out (1) that several Poultry Integrator Defendants, including Peterson, have asserted work product protection for environmental sampling and analysis materials similar to those Cobb-Vantress is seeking to compel from the State over the State's work product doctrine claim, and (2) that Peterson's work product claim to such materials

reflects that it agrees with the State's position that such materials are protected by the work product doctrine. Peterson, however, claims that this characterization of its position is "false." Motion, p. 3.

2. In the State's Response [Dkt. No. 960], pp. 5-7, the State stated as follows:

Cobb-Vantress contends in its Supplemental Brief, p. 9, that "environmental data and test results are non-privileged and discoverable facts." Cobb-Vantress's (and the other Tyson defendants') position, however, is contradicted by the position taken by several other Poultry Integrator Defendants. Their responses to the discovery requests served by the State reveal that they agree that materials such as those Cobb-Vantress seeks to compel are protected by the work product doctrine. . . . [A]lthough while reserving the right to supplement its response upon resolution of Cobb-Vantress's Motion to Compel, Peterson Farms, Inc. similarly asserted a privilege claim: "Peterson Farms objects to this request as it includes documents within its scope which are protected from disclosure, *see* General Objection No. 3 [ . . . the 'work product' doctrine; the 'trial preparation doctrine' . . .]." Responses of Defendant, Peterson Farms, Inc. to State of Oklahoma's July 10, 2006 Set of Requests for Production, Response Nos. 120-23 (Attached as Ex. 3) . . . . Simply put, Simmons, Cargill, Peterson and George's are asserting the same work product claim as the State.

Peterson's discovery response is once again attached hereto as Exhibit 1. When the State served on Peterson a series of requests for production of documents (beginning with No. 120), which asked about testing and analysis performed in the IRW, Peterson asserted work product protection:

Pursuant to Plaintiffs' refusal to produce documents in response to similar requests propounded by Defendant, Cobb-Vantress, Peterson Farms objects to the request as it includes documents within its scope which are protected from disclosure, *see* General Objection No. 3. Peterson Farms will supplement this response upon the final disposition of Cobb-Vantress' Motion to Compel. (Emphasis added).

Exhibit 1, p. 55 (emphasis added). Peterson's General Objection No. 3 explicitly invoked the work product doctrine:

Peterson Farms objects to each and every request to the extent it seeks or calls for information or the identification of documents which are protected from discovery and privileged by reason of: (a) the attorney-client communication privilege; (b)

the “work product” doctrine; (c) the “trial preparation” doctrine; (d) the joint defense or “co-party” privilege; or (e) any other applicable discovery rule or privilege.

Exhibit 1, p. 3 (emphasis added). Based upon this invocation by Peterson of the work product doctrine in response to the State's request, Peterson plainly asserted the same protections against discovery as the State did in its responses to the Cobb-Vantress discovery. The State said nothing false or scandalous in pointing out to the Court the inconsistency of Peterson's position. Based upon Peterson's assertion of work product protection, it is entirely fair for the State to conclude that Peterson "agrees" that the type of information claimed by the State is entitled to work product protection.

3. This inconsistency having now been pointed out, Peterson now appears to be back-pedaling from its work product claim. It states in its Motion, p. 2, that Peterson "lends its unqualified support to Cobb's Motion to Compel . . . ." Thus, Peterson has now gone on record supporting the position that such information is not protected by the attorney work product doctrine. Peterson's assertion that it "had no choice" but to assert a work product claim -- which by agreeing with Cobb-Vantress it now must necessarily believe is unfounded -- is specious. Motion, p. 3. The "choice" presented to Peterson by Fed. R. Civ. P. 34(b) was either to respond that documents would be produced, or to object if it had an objection. Peterson had a "choice," indeed a duty, not to assert a privilege or protection claim that it believes is improper. If Peterson now embraces the Cobb-Vantress position that such materials are not protected, it has no choice but to produce its responsive documents, yet it has not done so.

5. The Court should deny the motion to strike because the State's argument in the challenged portion of its Response is a fair comment on the positions taken by other Poultry Integrator Defendants, including Peterson. In evaluating the issues raised by the Cobb-Vantress,

the positions taken by the Poultry Integrator Defendants themselves on the same type of issue is obviously pertinent and should be considered by the Court. Their actions claiming work product protection for themselves speak louder than their words seeking to deny the same protection to the State.

WHEREFORE, for the foregoing reasons, the State asks the Court to deny Peterson's Motion to Strike.

Respectfully Submitted,

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